Congress of the United States
Washington, DC 20515

February 26, 2006

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

We urge you to immediately direct Attorney General Alberto Gonzales to exercise his authority under 28 U.S.C. §§ 509, 510 and 515 to appoint a Special Counsel to investigate recent reports that the National Security Agency may have conducted warrantless surveillance on U.S. persons in violation of the Foreign Intelligence Surveillance Act (FISA) and the 4th Amendment to the U.S. Constitution. We know that the security of the American people depend on our law enforcement and intelligence agencies' interception of communications between terrorist agents. We believe that this surveillance can and must be performed according to the rule of law.

The public, along with most Members of Congress, first learned of this wiretapping program when it was reported by the New York Times.[1] With no oversight activities being conducted by the House related to the program, and no clear information coming from your Administration, we have continued to rely primarily on press reports for information. As described in those reports, the program appears to violate the rights of U.S. persons both under the Foreign Intelligence Surveillance Act and the Fourth Amendment to the U.S. Constitution. Section 1802(a) of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1802(a), permits electronic surveillance of communications without a court order <u>only</u> if the Attorney General certifies that (1) these communications are exclusively between or among foreign powers; and (2) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party.[2] Consistent with the Constitutional requirements of the Fourth Amendment, FISA also requires a showing of probable cause in order to conduct wiretapping of U.S. persons.[3] According to the report in the New York Times, the NSA appears to have violated these prohibitions by conducting surveillance on at least 500 and possibly thousands of individuals located in the United States, "including American citizens [and] permanent legal residents"[4] who are United States persons within the meaning of FISA.[5]

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[1] *See* "Bush Lets U.S. Spy on Callers without Courts," James Risen and Eric Lichtblau, New York Times, Dec. 16, 2005.
[2] *See* 50 U.S.C. § 1802(a)(1).
[3] *See* 50 U.S.C. § 1805(a)(3).
[4] *See* n. 1.
[5] "United States persons" include U.S. citizens, lawful permanent residents, U.S. corporations, or associations consisting of a substantial number of U.S. citizens or permanent residents. *See* 50 U.S.C. § 1801(i).

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We have carefully reviewed the Attorney General's recent memorandum describing the legal basis for conducting this domestic surveillance program.[6] The power the Attorney General asserts of inherent Presidential authority to conduct surveillance on U.S. persons in a time of war appears to be constrained neither by Congressional authority to regulate intelligence collection nor by Fourth Amendment protection from unreasonable warrantless searches. This is not an assertion we find sound. We also take strong exception to the view that our Authorization to Use Military Force (AUMF), P.L. 107-40, inherently or implicitly authorized surveillance of U.S. persons as part of the war effort.

In addition to serious questions about the legal bases you have offered, we continue to have significant factual questions about this program. You stated that this program captures only international calls,[7] but press reports indicate that the domestic surveillance program also captured purely domestic calls within the United States.[8] You told the public that this program only captured calls "in which intelligence professionals have reason to believe that at least one person is a member or agent of al Qaeda or a related terrorist organization."[9] And yet the Attorney General stated that "This remains a highly classified program. It remains an important tool in protecting America. *So my remarks today speak only to those activities confirmed publicly by the President, and not to other purported activities described in press reports.*"[10] Mr. Gonzales' remarks imply that domestic surveillance activities beyond those described in your public statements are taking place. Although Mr. Gonzales characterized press reports describing domestic surveillance beyond what you have confirmed as "misinformed, confusing, or wrong," he did not state that the activities described in those press reports were not occurring at all, potentially including surveillance of purely domestic communications and communications not involving suspected members of al Qaeda.[11] These inconsistent statements leave serious questions about this program that have yet to be answered.

Unfortunately, Mr. Gonzales' recent testimony before the Senate Judiciary Committee did little to answer our questions or dispel our concerns. Rather, the Attorney General's opaque testimony simply left us with even more questions about this program. Mr. Gonzales repeatedly refused to discuss what he called the "operational details" of this program, refusing to inform the Committee of such "operational details" as whether the Department discloses to the FISA court its use of information garnered from this program in obtaining warrants from the court – in other words, whether the Department was

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[6] *See* U.S. Dept. of Justice, "Legal Memorandum Supporting the Activities of the National Security Agency Described by the President," Jan. 19, 2006.

[7] "The program applies only to international communications. In other words, one end of the communication must be outside the United States." Statement of the President to the National Security Agency, Jan. 25, 2006 (available at http://www.whitehouse.gov/news/releases/2006/01/20060125-1.html).

[8] *See* "Spying Program Snared U.S. Calls," James Risen & Eric Lichtblau, N.Y. TIMES, Dec. 21, 2005, at 1.

[9] *See* Statement of the President to the National Security Agency, *supra* n. 7.

[10] *See* Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center, delivered Jan. 24, 2006 (available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html).

[11] *See id.*

pursuing prosecutions based on evidence gathered in possible violation of FISA and the 4th Amendment. Press reports indicate that, in fact, evidence gathered under this program may have been used improperly to obtain warrants from the FISA court.[12] Mr. Gonzales refused to provide "operational details" such as whether the Administration has conducted warrantless physical searches of Americans in reliance on the authority it claims under the AUMF. Mr. Gonzales gave no explanation for the president's decision to limit this program (assuming it is in fact so limited) to international calls, vaguely citing the "circumstances" in which the Administration found itself as the basis for this decision. He also failed to confirm that he was "fully, totally informed" about the program, and could not provide assurances that Americans unconnected to Al Qaeda were not being spied upon. He failed to provide assurances that purely domestic calls were never captured by this program. He refused to commit to the program's review by the FISA court. He declined to answer when asked what other activities you have authorized relying upon the power as Commander-in-Chief used to authorize this surveillance program. The Attorney General offered contradictory testimony on whether surveillance conducted under this program would meet the 4th Amendment's probable cause standard. The Attorney General's testimony raised serious questions that previous Congressional testimony by Department officials about the Administration's surveillance programs was misleading. Far from providing additional information to Congress, the Attorney General's testimony simply created more serious questions about the legality and constitutionality of the activities you authorized.

At every juncture, our efforts to seek investigations to answer questions such as these have been stymied, generally based on the feeblest of excuses. More than a month ago, several members of Congress wrote to the Inspector Generals of the Department of Defense and the Department of Justice asking them to begin investigating these reports.[13] The Department of Justice's Inspector General, Mr. Glenn Fine, responded that he lacked jurisdiction to begin an investigation because the matter involved the Attorney General's provision of "legal advice."[14] The same members wrote back to Mr. Fine, explaining that the official actions for which they sought investigation appeared to go far beyond the mere provision of legal advice, and that he lacked any basis to conclude otherwise in the absence of an investigation. Yet, despite that response, Mr. Fine has steadfastly refused to investigate. The office within the Department of Justice to which he referred our request for investigation failed to respond to our request. Although recent press reports indicate that this office has begun a review, the Department has also made clear that this review will not examine the lawfulness of any Justice Department officials' actions under this program.[15]

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[12] *See* "Secret Court's Judges Were Warned About NSA Spy Data," Carol D. Leonnig, Washington Post, p. A01, (Feb. 9, 2006).

[13] *See* Letter from Congresswoman Zoe Lofgren, *et al*, to Thomas F. Gimble, Acting Inspector General, Department of Defense, *et al*, dated Dec. 20, 2005.

[14] *See* Letter from Glenn A. Fine, Inspector General, Department of Justice, to Congresswoman Zoe Lofgren, dated Jan. 4, 2006.

[15] *See* "Justice Department Reviews Role of Its Lawyers in Spying," Scott Shane and Eric Lichtblau, New York Times, Feb. 15, 2006. (According to a Justice Department spokeswoman, "[OPR] will not be making a determination on the lawfulness of the N.S.A. program, but rather will determine whether the department lawyers complied with their professional obligations.")

The Department of Defense's Acting Inspector General, Mr. Thomas F. Gimble, has refused requests by members of Congress that he investigate this program. Mr. Gimble referred those requests to the Inspector General of the NSA, who he claimed was already actively reviewing this program.[16] Yet, in subsequent news reports, it was revealed that the NSA review to which Mr. Gimble so swiftly deferred was not a new review but a long-standing audit, which would not review the legality of NSA's activities.[17] Furthermore, you yourself have indicated that the Inspector General of the NSA has long known of this program without apparently questioning its legality.[18] We fail to see how the Inspector General of NSA can review potential deficiencies in his own advice. Despite these deficiencies, Mr. Gimble has steadfastly refused to begin any investigation of his own. Moreover, we have received no response from the Inspector General of NSA, to whom Mr. Gimble referred our request for investigation.

The Government Accountability Office has also informed us that it will decline our request for investigation.[19] In explaining its decision, GAO in part has cited its expectation that your Administration will designate the agency records it seeks as foreign intelligence or counterintelligence materials, limiting GAO's statutory access to these records through the courts.[20]

Unfortunately, a pattern of resistance to investigation is emerging from the Executive branch agencies implicated by these allegations. Both the Department of Defense and the Department of Justice may have vested interests in blocking investigation of their activities supporting NSA's alleged unauthorized surveillance. If the effort to prevent vigorous and appropriate investigation succeeds, we fear the inexorable conclusion will be that these Executive Branch agencies hold themselves above the law and accountable to no one. Clearly, these are extraordinary circumstances calling for an extraordinary remedy. Mr. President, the only sufficient remedy is for Attorney General Gonzales to appoint a Special Counsel empowered to investigate these allegations thoroughly and without impediment.

We request that you direct Attorney General Alberto Gonzales to appoint a Special Counsel to investigate these allegations. The Special Counsel should be empowered to exercise his or her authority independent of the supervision or control of any officer of the Department of Justice. In addition to any powers available under 28 C.F.R. Part 600 of the Department's rules, the Special Counsel should be delegated all the plenary authority of the Attorney General with respect to the Department's investigation into these allegations, including the authority to investigate and prosecute violations of any federal criminal laws, as well as federal crimes committed in the course

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[16] *See* Letter from Thomas F. Gimble, Acting Inspector General, Department of Defense, to Congresswoman Zoe Lofgren, dated Jan. 10, 2006.

[17] *See* "N.S.A. Audit of Spying Is Not Assessing Legality," Scott Shane, New York Times, Jan. 11, 2006.

[18] *See* President's Radio Address, Dec. 17, 2005.

[19] *See* Letter from Gloria Jarmon, Managing Director for Congressional Relations, U.S. Government Accountability Office, to Congresswoman Zoe Lofgren, dated Feb. 7, 2006.

[20] *See* 31 U.S.C. § 716(d)(1)(A).

of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; to conduct appeals arising out of the matter being investigated and/or prosecuted; and to pursue administrative remedies and civil sanctions (such as civil contempt) that are within the Attorney General's authority to impose or pursue. There is ample precedent for such an appointment in the Department's appointment of Special Counsel Patrick J. Fitzgerald to investigate the alleged unauthorized disclosure of the identity of a CIA employee.[21] Indeed, the allegation of a secret NSA spying program conducting warrantless domestic surveillance of U.S. persons is at least as serious as the matter for which the Attorney General appointed Special Counsel Fitzgerald.

The circumstances surrounding these allegations necessitate the appointment of a Special Counsel under the Justice Department's own rules. Those rules require the appointment of an outside special counsel when (1) criminal investigation of a matter is warranted; (2) the investigation of that matter presents a conflict of interest for the Department; and (3) the appointment of a Special Counsel is in the public interest.[22] Under the FISA statute, surveillance of U.S. persons without a warrant would be a crime punishable by imprisonment. Given Attorney General Gonzales' potential authorization of surveillance under this program and his highly public defense of it, Justice Department officials under his supervisory control clearly would have a conflict of interest in investigating this program. Furthermore, it is unquestionably in the public interest for a Special Counsel to investigate this program and finally shed some light on it for Congress and for the public.

Mr. President, we strongly support the safeguarding of our homeland from terrorist threats. We know that the safety and security of the American people depend on the ability of our law enforcement and intelligence agencies to determine with whom terrorists are talking and what they are planning together. We believe it is essential that our surveillance of terrorists and their accomplices is performed within the bounds of the rule of law. If U.S. persons are indeed conspiring with suspected agents of a foreign terrorist organization such as al Qaeda, we want our intelligence and law enforcement agencies to have the ability to eavesdrop on their communications – as warrants obtained under the "probable cause" standard in FISA would allow. If existing laws including FISA are insufficient to conduct vital counter-terror intelligence activities, then we should have the opportunity to amend those laws within recognized processes under the rule of law. Mr. President, as you yourself have said, the heart of al Qaeda's terrorist campaign is the vision of a "totalitarian empire," opposed to our own nation's foundations in democracy and the rule of law. We must not now abandon democracy and the rule of law in the name of safeguarding them. We urgently ask that you agree to our request for a Special Counsel, so that these serious allegations can be finally investigated. Our constitutional system of government demands no less.

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[21] *See* Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, U.S. Attorney, dated Dec. 20, 2003; Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, U.S. Attorney, dated Feb. 6, 2004 (available at http://www.usdoj.gov/usao/iln/osc/).

[22] *See* 28 C.F.R. Part 600.1.

Sincerely,

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